It contends only that extraordinary cause for such disclosure must be shown, and that it did not exist in the present case.

But if the requisite cause for disclosure did not exist in this case, it is difficult to imagine a case where it could be shown. There is no question as to relevance or materiality of the testimony; there is no question as to the Appellees' right to knowledge thereof; there can be no doubt that the taking of the depositions of the witnesses four or five years after their grand jury testimony, would be at best an inadequate substitute for access to the recorded testimony;[22] and there can be no question that the order for disclosure was sensible and appropriate—indeed, imperative—in the administration of this Big Case.

As we have pointed out, at the time of entry of the order, the case had been pending for almost 3½ years. The Government's discovery was not completed, and the defendants' had not commenced. Indeed, the character of the industry had completely changed from one principally devoted to processing natural fats, to one primarily devoted to synthetics (R. 46). The leading lawyer for the Department of Justice in this case had retired and been replaced. Counsel for the Appellees and the trial judge himself were growing no younger. Witnesses were aging, retiring and even passing to the life beyond. Documents, pleadings, court orders were multiplying in staggering proportions. The cost of the proceedings was becoming a major item. The conscientious trial judge (since deceased) had desperately devised elaborate and promising procedures to govern many of the problems.

[22] Indeed, at least one of the important witnesses, James A. Reilly, Executive Vice-President of Colgate, was deceased (R. 472).

Can it be seriously argued that he did not have "good cause" for remitting the parties to a reading of recorded testimony in lieu of taking it all over again?

There is no rule of law, no precedent, which supports the Government's opposition. In general, the requisite showing of "good cause" under Rule 34 is met merely by an indication of the relevance and materiality of the material requested.[23] "Above all", as Government counsel said, "the liberal objectives of the Rule should be the touchstone." (R. 128). A customary type of "good cause" affidavit, used by Government counsel in this case, is set forth in the margin[24] (R. 52).

Prior statements of witnesses have repeatedly been required to be produced in response to Rule 34 motions. In these instances, it has been held that if the statements are relevant, adequate reason exists for compelling their production to avoid waste of time and energy and because ascertaining the prior testimony by subsequent deposition would not be satisfactory because of the dimming of memory through lapse of time.[25]

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[23] 4 Moore's Federal Practice § 34.08, p. 2450 (2d ed. 1950).

[24] "Walker Smith, being first duly sworn, says:

The documents called for in the attached motion, as listed in the attached Exhibit 'A', are relevant or material to the issues of this cause and are needed to aid the plaintiff in the preparation of its case, and particularly in support of the allegations contained in paragraph 34 of the Complaint.

Walker Smith, Trial Attorney, United States Department of Justice."

[25] *Herbst* v. *Chicago Rock Island and Pacific R. Co.*, 10 F.R.D. 14, 18 (D. Ia., 1950); *Bingle Liggett Drug Co.*, 11 F.R.D. 593 (D. Mass., 1951); *Panella* v. *Baltimore & Ohio R. Co.*, 14 F.R.D.

Hickman v. *Taylor*, *supra*, upon which the Government relies does not support their position. In the first place, *Hickman* involved the lawyer's "work product". Certainly, grand jury testimony is not in this category.[26] Indeed, since the Grand Jury is an arm of the Court, it may be that the court has more and not less freedom with respect to governing the use of transcripts taken in grand jury proceedings. In the second place, *Hickman* did not involve the recorded, sworn testimony of witnesses. As this Court said, it involved "an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney . . . ." (329 U.S. at 509). As Mr. Justice Jackson pointed out in his concurring opinion, there is a vast difference between a lawyer's work product and the "signed statements or those written by witnesses". Mr. Justice Jackson observed that the latter

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196, (D. Ohio, 1951); *Durkin* v. *Pet Milk Co.*, 14 F.R.D. 385 (D. Ark., 1953). In *Durkin*, the court stated (14 F.R.D. at 395): "If defendant is denied access to this data in the possession of plaintiff, it would have no other adequate means or remedy for obtaining this necessary information. Its alternative is to proceed to take separately the depositions of every one of the persons engaged in said hauling activities during the period referred to, to the extent that said persons were still subject to process. This would be a very lengthy and expensive proceeding. Even then, defendant could not be assured that it had the same data which is presently available in the files of the plaintiff, as there could be material discrepancies in the recollection of the various persons examined in view of the time which has elapsed since the original statements were obtained."

[26] The Government below argued that executive privilege attached to grand jury transcripts, presumably on the theory that they were Department of Justice property. This claim has been abandoned in this Court, but the Government's *Hickman* argument is reminiscent of the abandoned claim of privilege (R. 248, Gov't. Br. 31, Note 13).

may properly be the subject of a Rule 34 motion (329 U.S. at 519).

There is nothing in history, law or policy which would dictate such immunity as the Government seeks for the testimony of witnesses taken before Grand Juries. Reference is respectfully made to Lever's Memorandum filed in the trial court for a summary of the meagre historical materials that are relevant (R. 448-466). In recent times, the situation has been as follows:

1. In criminal cases, the courts will not permit access to grand jury transcripts for the purpose of attacking the validity of the indictment by determining whether probable cause existed. Most of the cases that have denied access to grand jury transcripts involve this issue.[27]

2. The statements and acts of the grand jurors themselves, as distinguished from witnesses before the grand jury, have long been protected by a strict, but not absolute, rule of secrecy. After the grand jury has risen, however, even this secrecy may be lifted and disclosure compelled if the ends of justice require. *United States* v. *Farrington*, 5 Fed. 343, 347 (N.D. N.Y., 1881); *Attorney General* v. *Pelletier*, 240 Mass. 264, 134 N.E. 406 (1922).

3. Even in criminal cases, the court may require disclosure of testimony given by witnesses before the grand jury, at least where the proceedings are con-

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[27] See collection of cases cited in *United States* v. *General Motors*, 15 F.R.D. 486, 487, Note 2A (D. Del., 1954). It was in this type of case that Judge Learned Hand made his oft-quoted statement. *United States* v. *Garsson*, 291 Fed. 646, 649 (S.D. N.Y., 1923).

cluded and the testimony sought is within the relatively restricted scope of the Criminal discovery rules: i.e., where they are evidentiary. Rules 6(e), 16, 17(c)); *Herzog* v. *United States*, 75 S. Ct. 349 (Douglas, J. Circuit Justice); *United States* v. *Remington*, 191 F. 2d 246 (2nd Cir. 1951) cert. den. 343 U.S. 907; cf. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150. In the *Remington* case, the Department of Justice had refused to disclose grand jury testimony even where the defendant was indicted for perjury committed before the grand jury. The Court, with Learned Hand, J., participating, held the defendant was entitled to his testimony. See also *Atwell* v. *United States*, 162 Fed. 97 (4th Cir. 1908); *Metzler* v. *United States*, 64 F. 2d 203 (9th Cir. 1933).

4. The testimony of witnesses before grand juries is not secret. They are not sworn to secrecy.[28] *United States* v. *Amazon Corp.*, 55 F. 2d 254, 262 (D. Md., 1931). Rule 6(e) of the Federal Rules of Criminal Procedure forbids swearing witnesses to secrecy. See also Advisory Committee's Note on Rule 6(e).

5. It appears to be generally recognized that after the grand jury's functions are ended, even the reasons for limited secrecy no longer obtain. Wigmore, Evidence, (3d Ed.) §§2360-2361; *United States* v. *Socony Vacuum Oil Co., supra.*

6. In civil cases, the question has seldom arisen. It can arise only in the rare case, like a Government antitrust case, where the civil suit is preceded by a grand jury investigation.

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[28] See the different oaths administered to the jurors and to witnesses (R. 453), and cases cited (R. 454).

The Government, however, does not and could not dispute the proposition that such disclosure could be required in an appropriate case. We submit that the test of appropriateness is to be found by reference to the letter and purpose of the federal rules as to civil discovery. As contrasted with the criminal rules, the civil precepts encourage the widest possible discovery not merely of evidentiary facts, but of material which will lead to full mutuality, prevent surprise and contribute to the fullest, possible knowledge. In light of those rules, as we have discussed, there is no reason for hesitancy in sanctioning the disclosure of the testimony of witnesses before grand juries which has been and will be used by the plaintiff, particularly in the extreme circumstances of this Big Case.

The Government's only specific policy argument is that secrecy must be maintained in order to encourage witnesses to make disclosures to the Grand Jury (Govt. Br. 40-42). They do not, and could not, however, follow the logic of this argument. They do not and could not maintain that witnesses should be guaranteed that their testimony before the Grand Jury will never be revealed. On the contrary, the Government itself has disclosed their testimony as and when it suited their purpose. *United States* v. *Socony Vacuum Oil Co., supra.* In antitrust cases, the Government customarily uses grand jury testimony to "refresh" the recollection of witnesses. Sometimes it uses this testimony in wholesale quantities. See *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. at 233. Considerations of "secrecy" or the alleged desirability of secrecy to encourage untrammeled disclosures apparently have not occurred to the Government as a reason for restricting this practice.

Indeed, this practice of the Government discloses the worm in the apple tendered to this Court. What the Government really seeks is an advantage over private litigants in antitrust cases: namely, the opportunity to take *ex parte* testimony and conceal it from the defendants. This is neither fair nor in accord with the rules of practice.[29]

In addition, the Government recognizes the fact that the Appellee could obtain disclosure of the testimony of witnesses at the trial if and to the extent needed. Gov't. Br. 53; *cf. Jencks* v. *United States*, 353 U.S. 657. This, too, reduces the alleged secrecy objective to a phantom, wistfully pursued, without substance or reality, the only purpose of which would be to delay and encumber the trial of an already huge case.

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[29] See *Bank Line* v. *United States*, 163 F. 2d 133, 138 (2nd Cir. 1947) where Judge Augustus Hand observed "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual."

A district judge has remarked that

"In all these cases, particularly in those seeking injunctive relief, the Government expects the utmost cooperation of the defendants or even *prospective defendants* in placing their files and records, ranging over periods of years, at the disposal of its agents. When objection is encountered, the widest use is made of the process of the courts. A justified criticism of the Government is, however, that *it is not so generous in reciprocating*. Thus, the Government stands on the liberal rules which allow them to plead the facts generally and resists *at all stages, every attempt to compel them*, through bills of particulars, to supply data which would give the defendants a definite idea of the line of attack which they may expect at the trial. Judges, in our circuit, including myself, have been rather generous in compelling disclosure, so as to *channel* the inquiry." Yankwich, *Observations on Anti-Trust Procedures*, 10 F.R.D. 165, 168 (1950). (emphasis in original)

Indeed, the *reductio ad absurdum* of the Government's position is its own argument that Appellees should take the depositions of the witnesses rather than read their testimony in the grand jury transcript. This, the Government says, is an entirely adequate alternative (Gov't. Br. 46-47). If it is, then how can it be argued that the concealment of their *recorded* testimony will protect them or will preserve "secrecy"?

The Government has offered to make the names of the witnesses available. It has urged Appellees to take their depositions. It intends to use their testimony at trial. It concedes the possibility that Appellees may be able to obtain it as the trial progresses. Certainly in these circumstances, it cannot be urged that "secrecy" considerations prevent the disclosure of the testimony by order of the trial court in advance of trial where such disclosure will, without doubt, save hundreds of days, thousands of dollars, and promote and expedite the trial.

We respectfully submit that this Court should make it clear that it is within the powers of the trial judge to order disclosure of the testimony of witnesses before a grand jury in a subsequent civil suit (a) where the grand jury has terminated its business, (b) where the testimony is relevant to the civil suit, (c) where the Government has used or proposes to use such testimony in connection with the civil case, and (d) where the trial judge determines that making the transcript available will save time and expense and promote the effective administration of the case.

CONCLUSION

For the reasons stated, Appellee Lever Brothers Company respectfully submits that the appeal should be dismissed or the judgment below affirmed.

Respectfully submitted,

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April 14, 1958

APPENDIX

Federal Rules of Civil Procedure

RULE 34.

DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. As amended Dec. 27, 1946, eff. March 19, 1948.

RULE 37.

REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

* * *

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being di-

rected to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

Rule 41.

DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. As amended Dec. 27, 1946, eff. March 19, 1948.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in

the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. As amended Dec. 27, 1946, eff. March 19, 1948.

Federal Rules of Criminal Procedure

RULE 6. THE GRAND JURY

(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 51.

UNITED STATES OF AMERICA,
Appellant,

v.

THE PROCTER & GAMBLE COMPANY,
COLGATE-PALMOLIVE COMPANY,
LEVER BROTHERS COMPANY and
THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEE COLGATE-PALMOLIVE COMPANY.

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April 14, 1958.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEE COLGATE-PALMOLIVE COMPANY.

Questions Presented.

The district court upon motion of the defendants in a complex civil antitrust action entered orders directing the plaintiff to produce for inspection and copying transcripts of the testimony of all witnesses who appeared before a grand jury during an investigation of the soap and synthetic detergent industry which immediately preceded the filing of the civil complaint. The transcripts of testimony were

admittedly in the possession of the plaintiff, had been used in preparation of the civil action and would continue to be so used. Upon motion of the plaintiff this order was superseded by an order providing that unless the plaintiff produced these transcripts for inspection and copying, the complaint would be dismissed. The plaintiff then failed to produce the transcripts, pursuant to its previously announced intention not to produce them; and the complaint was dismissed.

This appeal presents the following questions, rather than those stated in the brief for the appellant, who was the plaintiff below:

1. May the appellant procure review of the superseded orders for production of the transcripts through appeal of the judgments dismissing the complaint, where the dismissal was pursuant to an order entered on the appellant's own motion?

2. Has the appellant standing to appeal the orders for production of the transcripts on grounds of public policy in view of the status of the grand jury as an appendage of the district court?

3. Assuming the merits of the orders for production can be reached, did the district court abuse its discretion in ordering production of the transcripts under the particular circumstances of this case?

Statement.

A. The orders for production.

A federal grand jury sitting in Newark, New Jersey, for a full eighteen months from May 1951 to November 25, 1952 investigated possible violations of the antitrust laws in the soap and synthetic detergent industries. No indictment was returned (R. 207).

Through grand jury subpoenas large quantities of documents were secured from the present defendants, most of them during 1951, as well as from some 70 other companies and individuals (R. 226, 430-8, 471).

In addition, a number of witnesses were called. Of these the defendants were aware of the identity of 28, of whom 27 testified during the period from June 16, 1952 through November 18, 1952 (R. 471).* The last of these witnesses was Mr. E. H. Little, the president of Colgate-Palmolive Company (hereinafter called "Colgate"), who testified just one week before the grand jury was discharged (R. 483).

On December 11, 1952 less than three weeks after the grand jury was discharged, the complaint was filed in the present civil action. It was truly comprehensive in scope. Its allegations cover the period from 1926 to the date of filing, and they deal with every conceivable aspect of the soap and synthetic detergent industry, including purchasing of raw materials, sales methods, selling prices, by-products, patents, advertising, mergers and many other matters (R. 1-16).

A Department of Justice press release issued on the day the complaint was filed stated:

> "The filing of the complaint results from a careful and thorough investigation of the industry including extensive grand jury proceedings" (R. 211).

After the complaint was filed various complex pre-trial discovery methods were pursued. A discussion of the problems presented by this "big case" appears in an appendix

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* The only summary in the record as to the number and nature of the witnesses appears as a statement in Colgate's brief in the district court. This statement has been adopted by the appellant, however, at pages 41-42 of its present brief; and presumably it is not subject to dispute.

to the district court's opinion granting production (R. 218-39). This pre-trial discovery resulted in some elaboration of the bare and conclusory allegations of the complaint, but up to the time of the motions for production of grand jury testimony, the plaintiff had not been ordered "to disclose any detailed, evidentiary facts" (R. 236) and had not done so.

It was against this background that the defendants' motions for production of the transcripts of grand jury testimony were argued on December 12, 1955 (R. 136). These motions sought only testimony, not any other proceedings in the grand jury (*e.g.*, R. 133). The civil action had been pending at that time for three years. Throughout that period it had been assigned to the same judge, the late Alfred E. Modarelli.

On April 17, 1956 the court filed a full opinion giving his reasons for concluding that the defendants were entitled to production of the grand jury transcripts (R. 206-18). The close of this opinion states:

> "I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy. These motions were considered by me objectively and honestly by setting aside all my preconceived ideas on the subject.
>
> "The court concludes that since plaintiff is using the transcripts containing relevant information, the ends of justice require the court to order plaintiff to produce and permit the inspection and copying by defendants of the transcripts; equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial; none of the reasons for the rule of secrecy applies" (R. 217-8).

The plaintiff then filed a "motion for reconsideration" based upon a "Claim of Privilege" signed by the Attorney General pursuant to his formal determination that disclosure "would be prejudicial to the grand jury system and not in the public interest" (R. 247-9). On July 9, 1956 the court filed a second opinion denying this motion (R. 257-62).

Orders were then entered dated July 23, 1956 requiring production within thirty days (R. 262-7).

B. The judgments of dismissal.

The subsequent procedure resulting in judgments of dismissal is set out in some detail in Colgate's motion to dismiss or affirm dated January 2, 1957 at pages 4-8, and we shall only summarize it here.

At the hearing on July 23, 1956 when the orders for production were submitted and signed, counsel for the plaintiff informed the court that

> "the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered" (R. 330).

To this, counsel for the defendants replied that they would have to wait until expiration of the time for production and, if the plaintiff adhered to that position

> "we shall have to take such further steps under the rules as we may be advised" (R. 330).

No mention of dismissal was made by anyone.

On August 16, 1956 the plaintiff then filed a "motion to amend or, alternatively, to stay order of July 24, 1956" attaching a proposed order, an affidavit of Herbert Brownell, Jr. and a brief (R. 317-22).

The motion requested that an amended order in the form annexed be entered "in substitution for" the orders

for production previously entered. Clearly as a second choice a stay of these orders was asked pending the filing of appeals and/or application for an extraordinary writ (R. 317, 334).

Thus in presenting the proposed amended order, counsel for the plaintiff said:

> "And we are therefore coming before your Honor to suggest that the order be amended in a way to eliminate these possibilities. And, alternatively, *if your Honor does not see fit to amend the order* we are asking for a stay of the order pending the taking of necessary appellate review in the Supreme Court" (R. 333; italics added).

By this motion, the plaintiff sought to be relieved of the orders to produce. The basis for the motion was stated to be that it would be "unseemly" for the Attorney General to be placed in the dilemma of "having to comply with a court order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order • • •" (R. 319). The brief in support of the motion recited:

> "If such an amended order is entered, the United States intends to appeal from the subsequent judgments of dismissal • • •" (R. 321).

A hearing on the motion was held on August 21, 1956. Counsel for the plaintiff restated these points (R. 332-4), and counsel for each of the defendants in effect took the position that while he considered the prior orders proper he did not see how he could oppose the relief sought by the plaintiff in the proposed amended order (R. 334-5). Accordingly, the order was signed by the court just as the plaintiff had submitted it (R. 335-6).

This amended order no longer required production of the grand jury testimony. It provided instead:

"Ordered that unless the plaintiff on or before August 24, 1956 produces * * * the aforesaid transcripts of the testimony of witnesses who appeared before the said Grand Jury, the Court will enter an order dismissing the complaint herein" (R. 323).

The court inquired under date of September 6, 1956 by a letter to all counsel whether the transcripts had been produced, concluding:

"If the plaintiff has not produced, the court will enter an order dismissing the complaint as provided in the amended order" (R. 361).

Counsel for the plaintiff replied that "plaintiff has not produced the grand jury transcripts for inspection by the defendants" (R. 362). Counsel for each defendant also replied, reporting that the plaintiff had refused to produce, and submitting judgments of dismissal (R. 363-7).

These judgments of dismissal were all entered on September 13, 1956 (R. 325-8).

Summary of Argument.

1. It is undisputed that judgments entered by invitation or on consent are always affirmed on appeal without consideration of the merits. Nor can an interlocutory order be appealed by taking a voluntary judgment of dismissal and appealing the order in the guise of appealing the judgment.

A. The appellant seeks to avoid these principles by saying that the dismissal here was not in fact invited or consented to, because it resulted not from the amended order which the appellant proposed but from its refusal to produce transcripts of grand jury testimony in accordance with that order. This distinction is wholly immaterial. The appellant concedes that had

it requested dismissal when the orders for production were entered it could not have secured review. This principle cannot be circumvented by the simple device of proposing an order which requires dismissal upon the happening of a condition subsequent solely in the control of the would-be appellant.

B. The appellant relies on *Thomsen* v. *Cayser*, 243 U. S. 66, a decision which permitted plaintiffs who won on the merits in the trial court and were reversed in the court of appeals to waive the right to a new trial and appeal the judgment of dismissal. That decision is inapplicable. There the plaintiffs had not consented to judgment, judgment on the merits having already been rendered against them. Moreover, the appeal, whoever won, would finally dispose of the case. In *Thomsen* v. *Cayser* the plaintiffs waived the *right* to a new trial; here the appellant seeks to avoid the *burden* of dismissal freely chosen in order to be relieved of production. *Thomsen* v. *Cayser* stands only for the proposition that a party need not perform the useless task of trying a case again on the merits as a condition to putting judgment already rendered against him in final form when he has no further evidence to offer.

C. What the appellant seeks here is the review of interlocutory orders, which orders no longer are in existence because they were superseded by the amended order which the appellant proposed. Review of interlocutory orders by appeal of voluntary judgments of dismissal has been disapproved in numerous decisions, such as *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936). Any pressing matters of public policy raised by the orders for production could have been presented by a motion for a stay pending application for an extraordinary writ. The appellant expressly chose not to pursue that course, and an approach *in terrorem* to this Court on the basis that the invited judgments of dismissal were with prejudice is not justified.

2. The appellant claims standing to appeal solely on the ground of public policy, not on the ground that disclosure would be prejudicial error against it as a litigant in this specific action. The grand jury, however, is an arm of the court, not of the prosecution. Rule 6(e) of the Federal Rules of Criminal Procedure imposes an obligation upon attorneys for the Government to disclose matters occurring before the grand jury only when so directed by the court. It gives them no right to object to a disclosure ordered by the court. When the court granted disclosure, it granted disclosure of court papers. The appellant was not aggrieved as a litigant in this action by the orders for production and accordingly has no standing to appeal those orders.

3. In order to reverse the district court's orders for production of grand jury testimony, if the merits of those orders are reached, it will be necessary to find abuse of the discretion existing both under Rule 6(e) of the Federal Rules of Criminal Procedure and Rule 34 of the Federal Rules of Civil Procedure. Under Rule 6(e) the standard is that the ends of justice require disclosure, and this is equivalent to whatever showing of good cause is required by Rule 34, to the extent that the latter rule is deemed to govern.

A. Under either standard, the liberal rule of pretrial discovery stated in *Hickman* v. *Taylor*, 329 U. S. 495, is necessarily the controlling policy.

B. Undisputed facts concerning the nature of the testimony and appellant's use of it upon which the district court's discretion was exercised include: That the grand jury investigation was coextensive with the present civil action, that the grand jury testimony was used

to prepare this action, that the appellant will continue so to use it and, moreover, that the appellant maintains its right to seek disclosure at the trial of such portions as it deems appropriate or desirable. In addition, facts were presented to the district court indicating strongly that the testimony of some or all of the witnesses was secured solely for discovery purposes for the present civil action.

C. There is no traditional policy of secrecy relating to testimony of witnesses after the grand jury's functions have ended, and disclosure is wholly proper where the ends of justice require it. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. None of the reasons underlying grand jury secrecy is applicable in the present situation.

D. Under any standard sufficient cause for disclosure was presented to the district court. No other type of discovery would be a substitute. Depositions would be inadequate, particularly in view of the number of witnesses and the complicated nature of the issues. However, in so far as depositions did elicit the same facts as the grand jury testimony of the witnesses, they would eliminate the secrecy of that testimony. To the extent that *Hickman* v. *Taylor* requires an unusual showing for production of attorneys' work papers and mental impressions, it has no bearing on the present case. The appellant is disarmed to argue public policy. It is in the position of a civil litigant trying to preserve a competitive advantage secured through court process. The district court properly concluded that the ends of justice required that this effort not succeed and that good cause existed for production. Under the particular circumstances of this complex antitrust action the district court did not abuse his discretion in requiring production of the transcripts of grand jury testimony.

ARGUMENT.

POINT I.

The orders of the district court to produce transcripts of grand jury testimony cannot be reviewed through appeal of the invited judgments of dismissal.

The question of whether review may be had by the appellant of the district court's orders for production in view of the way in which the dismissal was procured was treated at length in Colgate's motion to dismiss or affirm. We shall not repeat what was said there. Instead we shall summarize the points made and then discuss the appellant's argument in the light of those points.

The following principles of federal practice are established by the authorities cited in Colgate's motion:

1. A judgment entered by invitation or on consent is always affirmed on appeal without consideration of the merits. One who consents waives his right to object, or as it is sometimes put, he is estopped to convict the court of invited error. Also, he is not aggrieved by an order to which he consents, and therefore he cannot appeal. Thus, voluntary dismissals are not reviewable.

2. One cannot accept the benefits of an agreed judgment and appeal from the burdens.

3. Adverse interlocutory orders may not be made reviewable by taking a voluntary judgment of dismissal and appealing the order in the guise of appealing the judgment.

The appellant does not dispute any of these principles. Its position is that they do not apply to the present dismis-

sal. The three branches of the argument in its brief appear to be as follows:

> A. The appellant did not in fact invite or consent to the dismissal below (Appellant's brief, pp. 20-3).
>
> B. The present appeal comes within the principle of *Thomsen* v. *Cayser*, 243 U. S. 66 (Appellant's brief, pp. 23-8).
>
> C. The cases forbidding review of interlocutory orders through voluntary dismissals or nonsuits do not apply because the appellant here did not invite or consent to the dismissal (Appellant's brief, pp. 28-30).

We shall consider each of these points separately.

A. Appellant's invitation of dismissal in the district court.

If words are given their ordinary meanings, appellant's statement of why its proposed amended order did not constitute an invitation to dismiss the action is incomprehensible. Thus on page 20 appellant's brief states:

> "We submit that the foregoing facts show that in proposing the amendment of the order to specify that non-production would result in dismissal of the complaint, rather than some other consequence (*e. g.*, a contempt proceeding), the Government neither invited, nor consented to, the dismissal which followed such non-production."

On its face this statement is equivalent to saying that black is white, especially when one considers that before proposing the amendment the appellant had already informed the court that it would not produce the transcripts (R. 330), and the motion papers requesting the amendment repeated this position (R. 319-21).

The appellant makes the point that if the original production orders had provided for dismissal in case of non-

compliance, it could have appealed a judgment of dismissal entered as a result of non-compliance, citing *United States* v. *Cotton Valley Operators Committee,* 399 U. S. 940 (see appellant's brief, page 21). This we concede.

Counsel for the appellant, on the other hand, must concede that if upon entry of the orders for production they had simply moved to dismiss the action, they could not have secured review of the dismissal. Indeed, they do concede this by stating at page 11 of their brief, and again at page 19, that it was pointed out to the court that non-compliance with the original orders would place the Government's chief law enforcement officer in the unseemly position of disobeying an outstanding order of the court,

> "while voluntary dismissal would mean sacrificing the broad public interest in obtaining a determination of the violation of the antitrust laws charged in the complaint and appropriate relief (*ibid.*)" (Appellant's brief, p. 19).

In the interest of accuracy, however, we must note that nothing resembling this statement was in fact ever presented to the district court (R. 315-22, 331-6). Of course, a stay pending application for an extraordinary writ would have avoided any such dilemma.

The question, then, is whether what occurred in this case more nearly resembles an involuntary dismissal, concededly reviewable, or a voluntary dismissal, concededly not reviewable.

It appears disingenuous for the appellant to argue that, by proposing a procedure under which it made two bites of the dismissal, it thereby converted an unreviewable voluntary judgment into a reviewable involuntary judgment. Yet the appellant's entire position on the point is that

> "the dismissal was not the result of the amendment of the order, but of the Government's refusal to produce in accordance therewith" (Appellant's brief, p. 21).

It is hard to imagine a less material distinction.

In the very papers that proposed the order the whole sequence of events intended by the appellant was laid out. Thus the brief in the district court said:

> "Under these circumstances, we urge the Court to enter an amended order which provides that if the transcripts are not made available by August 24 (the date previously fixed by the Court), an order will be entered dismissing the complaint * * * If such an amended order is entered, the United States intends to appeal from the subsequent judgment of dismissal * * *" (R. 321).

The rule against review of voluntary dismissals surely cannot be circumvented by the simple device of proposing an order which requires dismissal on the happening of a condition subsequent solely in the control of the would-be appellant.

B. Inapplicability of *Thomsen* v. *Cayser*, 243 U. S. 66.

To avoid the many cases cited in the appellees' motions to dismiss or affirm which hold consent judgments and voluntary dismissals not appealable, the appellant relies upon the case of *Thomsen* v. *Cayser*. This decision and the two subsequent cases in this Court which follow it (see appellant's brief, page 25, footnote) deal with a specific situation not related to the present one.

As the appellant's brief states, page 23, that was a case in which the plaintiffs had secured judgment below in a private antitrust suit, the trial court having found for the plaintiffs as a matter of law. The trial had been conducted

on the theory that the reasonableness of the defendants' restraint was immaterial. Subsequently this Court decided *Standard Oil Co.* v. *United States,* 221 U. S. 1 and *United States* v. *American Tobacco Co.,* 221 U. S. 106. The Court of Appeals concluded that it could not hold the restraint unreasonable as a matter of law. However, the court thought it would be unduly prejudicial to dismiss and so granted a new trial, *Union Castle Mail S. S. Co.* v. *Thomsen,* 190 Fed. 536 (2d Cir. 1911). The plaintiffs then petitioned for rehearing and asked for dismissal rather than a new trial. In granting the petition the Court of Appeals stated:

> "PER CURIAM. We understand from the petition of the plaintiffs below that they do not desire to present additional testimony and do not wish a new trial of this action. We understand, also, that they are willing to stand on the record as made, and that they prefer instead of a decision granting a new trial, a decision reversing the judgment and directing the Circuit Court to dismiss the complaint in order that they may carry the case to the Supreme Court without further delay" (190 Fed. 1022).

This Court in denying a motion to dismiss the appeal said:

> "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay" (243 U. S. 83).

The important point is that the plaintiffs, unlike the appellant here, did not consent to a *judgment* against them. Judgment on the merits had already been rendered against them. They, presumably because they had no additional evidence on the merits to offer, waived their right to a new trial and stood on the record below in order to get appellate

review of the point of law on which their judgment on the merits had been reversed. That appellate review would necessarily dispose of the case. If the Court of Appeals was affirmed, of course, the plaintiffs would be concluded. Equally, however, if the Court of Appeals was reversed, then the defendants would be concluded. Either way the case was over. The sole purpose of the plaintiffs' waiver was to put the judgment previously rendered against them on the merits in final form so that it would be appealable. This they did by waiving the right to a new trial offered by the Court of Appeals.

The posture of the appellant here is wholly different. The only judgments entered against it were upon its own invitation. The orders for production were not judgments and bore no relation to the merits of the action. The appellant here did not waive a right to attempt to have an adverse judgment set aside by the lower court rather than the appellate court. Its position is simply this: it was dissatisfied by an interlocutory order and therefore invited entry of judgment of dismissal.

The argument is made that in both *Thomsen* v. *Cayser* and here the change was in the form of the order rather than in its substance. Such distinctions are generally meaningless as a basis for decision. Also, as this Court recently said in *Carroll* v. *United States,* 354 U. S. 394, 406:

> "Moreover, in a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction."

In any event, it is difficult to view a change from an order to produce documents to an order providing for final judgment if they are not produced as a mere change in form.

Equally difficult to follow is the argument that this was not a voluntary dismissal because "the Government pro-

posed a change in the form of the order not [as in *Thomsen* v. *Cayser*] to expedite an appellate ruling, but to further the public interest by avoiding the 'unseemly position' of requiring the country's chief law enforcement official to choose among alternative courses of conduct * * *" (see appellant's brief, pages 25-26). This choice is an additional reason that no appeal is permissible. The appellant in order to be relieved of the necessity for production of the transcripts, or of possible contempt citation or other alternatives open to the court, freely chose dismissal. Having accepted the benefit of non-production, the appellant should not now complain of the burden of dismissal, a point discussed in Colgate's motion to dismiss or affirm at pages 17-19. In *Thomsen* v. *Cayser,* the appellants waived a right offered them, the right to a new trial. Here the appellant seeks to avoid a burden voluntarily accepted.

Thomsen v. *Cayser* stands only for the sensible proposition that a party should not be put to the useless task of going through a second trial on the merits as a condition for putting judgment already rendered against him in final form when he has no further evidence to offer. The appellant here is not in that situation.

C. Appeal of interlocutory orders.

Colgate's motion to dismiss or affirm, pages 19-21, lists cases from this Court and the courts of appeals of seven circuits which hold voluntary dismissals or nonsuits not reviewable. If a plaintiff dissatisfied with an interlocutory order could dismiss the action and then appeal the order in the guise of appealing the dismissal, the rule against appeal of interlocutory orders would become meaningless.

To this argument, the appellant's only answer is that the dismissal in the present case was not invited or consented to. Thus, it is said, the production order can be reviewed

> "under the general principle that where, as a result of non-compliance with an interlocutory order, a court enters a final judgment of dismissal, review of the latter necessarily embraces review of the earlier order upon which it depends. * * * The principle is equally applicable here" (Appellant's brief, pp. 28-9).

The fallacy in this position is well illustrated by the fact that the "earlier orders" sought to be reviewed do not exist any more. They were superseded on appellant's motion. The action was not dismissed as a result of non-compliance with those orders. The court never had the chance to decide the result of non-compliance. The action was dismissed pursuant to appellant's amended order, with which there was complete compliance—i.e., the transcripts were not produced and the complaint was dismissed just as the order provided and as the appellant intended at the time the amended order was submitted to the court. Thus the appellant is here in the position of asking review of non-existent orders as part of review of invited judgments of dismissal.

Perhaps the most cited case on the non-reviewable nature of voluntary dismissals is *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936). There Judge Parker said for the court:

> "But, although a voluntary nonsuit is a final termination of the action, it has been entered at the request of the plaintiff, and he may not, after causing the order to be entered, complain of it on appeal. For this reason, it is well settled in the federal courts that no appeal lies from a judgment of voluntary nonsuit * * *
>
> "It does not help plaintiff to say that his complaint is of the order refusing remand of the cause

> and not of the judgment of nonsuit, which is relied upon merely as a final order from which appeal may be taken. Even in those rare jurisdictions • • • which permit appeal from an order of voluntary nonsuit where there is a ruling of the court which strikes at the heart of the case and precludes recovery by plaintiff, appeal from such order does not lie to review rulings which do not have the effect of determining the case against plaintiff.
>
> • • • • • •
>
> "The crux of the matter is that an order refusing to remand is not a final or appealable order, and plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing" (86 F. 2d 297).

That is precisely the situation here. The order for production of the transcripts of grand jury testimony was not an order which had "the effect of determining the case against plaintiff," and it was thus not appealable under any system of practice. If the appellant thought the order was fraught with all the detrimental effects upon public policy relating to grand jury proceedings now claimed, that position could have been presented fully upon an application for an extraordinary writ, with a stay of the orders pending the application. No effort was made, however, to pursue this course. Dismissal was chosen instead.

It is interesting to note that the appellant now volunteers that this dismissal was with prejudice (see appellant's brief, page 29, footnote). Whether with or without prejudice, the invited dismissal as a consent judgment is equally not appealable. Also in either case, a reversal would not, unlike *Thomsen* v. *Cayser*, dispose of the action; and hence allowing this appeal would be allowing an interlocutory appeal.

Acknowledging that the dismissal is with prejudice, gether with reciting the previously quoted statement roneously said to have been made to the district court out "sacrificing the broad public interest in obtaining determination of the violation of the antitrust laws arged in the complaint and appropriate relief", suggests at the appellant proposes an argument *in terrorem* to is Court. The argument would be that an affirmance on is procedural point will prevent dealing on the merits th alleged monopolization and restraint of trade in the ap and synthetic detergent industry.

Here again, the obvious way for the appellant to pre-rve whatever rights it had would have been to request a ay pending an application for an extraordinary writ. It d not choose this course. As previously noted, it expressly jected this course; and in entering the judgments of dis-ssal the court was merely doing what the appellant asked. us the appellant now seeks to force this Court to pass on an interlocutory ruling and to do so in the posture ere an adverse decision would dispose of the case on e merits. We submit that these tactics do not warrant couragement.

Brushing aside all the non-essentials, we have here the mple proposition of a plaintiff who seeks review of an verse interlocutory order by means of voluntarily request-g a judgment of dismissal. Both precedent and common nse require that he not succeed.

Accordingly, the judgments should be affirmed without rther consideration of the merits.

POINT II.

The appellant has no standing to appeal the orders for disclosure of grand jury testimony.

The appellant seeks to appeal here only the general question of public policy. It does not claim that disclosure of the grand jury testimony would be prejudicial error against it in this specific action against these defendants. It defends its right to use the testimony (see appellants' brief, pp. 50-53), but it does not say that as a litigant *in this case* it has a right to exclusive use. It does not and cannot claim a role with respect to the particular grand jury involved, now long discharged. It appeals only the pure and abstract question of the considerations underlying secrecy of grand jury proceedings.

The Attorney General, however, is not the public official charged by law with protection of public policy relating to grand jury secrecy. The grand jury is traditionally regarded as an appendage of the court, *Ex parte Savin,* 131 U. S. 267, 277, or an arm of the court, *Carlson* v. *United States,* 209 F. 2d 209, 213 (1st Cir. 1954). In *Cobbledick* v. *United States,* 309 U. S. 323, 327 this Court said:

> "The proceeding before a grand jury constitutes 'a judicial inquiry', *Hale* v. *Henkel,* 201 U. S. 43, 66, of the most ancient lineage."

See also *Wilson* v. *United States,* 77 F. 2d 236 (8th Cir. 1935), *cert. denied,* 295 U. S. 759 and the cases discussed in that opinion. In no sense is the grand jury an arm of the prosecution. See *Durbin* v. *United States,* 221 F. 2d 520 (D. C. Cir. 1954).

Rule 6(e) of the Federal Rules of Criminal Procedure provides:

> "(e) *Secrecy of proceedings and disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding. * * * No obligation of secrecy may be imposed upon any person except in accordance with this rule."

The Advisory Committee Note to this subdivision reads in part:

> "1. This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure * * * Government attorneys are entitled to disclosure of grand jury proceedings, other than deliberations and the votes of jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice."

Thus under Rule 6(e) and the common law rule which it embodies the sole right of attorneys for the Government in respect of grand jury testimony is disclosure for use in the performance of their duties. They in turn have an *obligation* to disclose matters occurring before the grand jury only when so directed by the court. They have no *right* under the rule to prevent or object to disclosure.

In the district court, and even here in its jurisdictional statement, page 8, the appellant has sought to invoke a privilege against disclosure of the transcripts of grand jury testimony as "executive papers" subject to a formal claim of privilege by the Attorney General. The appellant has now receded from this position (see appellant's brief, page 31, footnote).

This recession is proper, but it does not go far enough. Under the applicable rule, the appellant is not charged with the responsibility of protecting the secrecy of grand jury proceedings except in a purely negative sense. Government attorneys may not disclose grand jury testimony except pursuant to direction of the court. Nothing in logic or in precedent, however, gives them any standing to instruct the court as to the standard by which the court shall order disclosure. It is, rather, for the court to instruct them.

It may well be that if the Attorney General became conscious of what he considered abuse of discretion on the part of a court in disclosure of grand jury proceedings he could or should inform the court of his views. It may be that if the court rejected those views he could or should seek review through an extraordinary writ. This course was not chosen.

The fact that the Attorney General has physical possession of these papers can make no difference as to his standing to appeal. Such possession must necessarily arise under Rule 6(e) and be subject to control of the court. See *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 21 F. R. D. 233 (D. D. C. 1957). It would unquestionably be proper for the court to have possession of a copy of the transcripts. If that were so and pursuant to motion by the defendants the court disclosed them, surely no one would seriously suggest that the Attorney General could invite a dismissal and then appeal on grounds of public policy. Thus the appellant is erecting its entire standing to appeal upon the happenstance that the Attorney General had a copy of the transcripts and the court did not.

The appellant may not in its role as a litigant secure an appeal as of right of an order to which its objection is solely in its role as preserver of grand jury secrecy. As a

litigant it was not aggrieved by the orders for production, and not being aggrieved, it may not appeal them, *Parr* v. *United States*, 351 U. S. 513.

The fact that the appellant as a litigant in this specific action, with an obvious competitive advantage secured through use of the grand jury testimony, seeks in the name of public policy to appeal the orders which would remove that advantage presents an anomaly. This anomaly shows the wisdom of the procedure which leaves the policy as to grand jury secrecy solely in the discretion of the district court.

Accordingly the judgments should be affirmed.

POINT III.

The orders to produce the transcripts of grand jury testimony were a proper exercise of discretion by the district court.

In order to reverse the district court's orders for production of the transcripts of grand jury testimony, assuming the merits of those orders can be reached, it is necessary to find a double abuse of discretion.

The court's orders are supported by two separate grants of discretionary power. That given by Rule 6(e) of the Federal Rules of Criminal Procedure to direct an attorney for the Government to disclose matters occurring before the grand jury has already beeen discussed. The court also has pursuant to Rule 34 of the Federal Rules of Civil Procedure discretion to order production of documents in the possession of parties. *Hickman* v. *Taylor*, 329 U. S. 495, 512.

Other district courts have relied solely upon Rule 6(e) or the common law rule in ordering disclosure of grand jury

testimony in connection with various types of non-criminal proceedings: *Doe* v. *Rosenberry*, 152 F. Supp. 403 (S. D. N. Y. 1957), a disciplinary proceeding against a member of the bar; *In re Bullock*, 103 F. Supp. 639 (D. D. C. 1952), an investigation of dereliction of duty by a police inspector; *In re Grand Jury Proceedings*, 4 F. Supp. 283 (E. D. Pa. 1933), a proceeding to revoke a beer permit.

The court here, however, treated the motions as being brought under Rule 34; and in his opinion he equated a showing that the ends of justice require disclosure with a showing of good cause (R. 208). We submit that this analysis is correct if Rule 34 is deemed the basis of the orders, and that technical arguments of the sort the appellant makes as to what constitutes "good cause" for production of other types of documents in other types of cases carry no weight.

In any event, in order to reverse this Court must decide both that the ends of justice did not require production and that good cause for production was not shown and, further, that the district court committed an abuse of discretion under both standards in reaching the opposite conclusion.

At the outset of the following discussion, we should like to emphasize that the district court's decision was based upon his thorough knowledge of the facts of this particular case and his decision relates only to this particular case. The appellant tries to argue as though this decision throws open the testimony of all witnesses before all grand juries. It does not, of course, and was not intended to do so. The court's decision was based upon the problems of the "big case" and of this particular big case (R. 209, 262). As the court said during the argument of appellant's motion for reconsideration:

> "It was not my intention, of course, to tear the curtain right off the grand jury for any purpose. I

thought that my opinion was very careful, and I was only judging the facts in this case, and this type of litigation. That is all" (R. 303).

A. The liberal discovery policy in civil actions.

Whether the court's discretion was exercised under Rule 6(e) or Rule 34 or both, the policy behind the exercise necessarily is the liberal rule of pretrial discovery in civil actions, which this Court summarized in *Hickman* v. *Taylor*, 329 U. S. 495, 507:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.[8] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. • • •

> "8 'One of the chief arguments against the "fishing expedition" objection is the idea that discovery is mutual—that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position.' Pike and Willis, 'Federal Discovery in Operation,' 7 Univ. of Chicago L. Rev. 297, 303."

B. The nature of the grand jury testimony and appellant's use of it.

The following facts as to the nature of the testimony and appellant's use of it, which were stated in Colgate's briefs to the district court, have never been disputed:

1. The grand jury investigation was co-extensive with the complaint in the present civil action (R. 473).

2. At least 28 witnesses testified, these consisting of current and former officers and employees of the

defendants in the civil action, and representatives of grocery chain stores, oil and chemical companies, a meat packer, a tallow broker, a fats and oils trade journal, a market survey organization and a supplier-competitor (R. 471-2).

3. The appellant has used the grand jury testimony in preparing the present civil action (R. 485).

4. The appellant will continue to use the testimony in preparing and trying this action (R. 486, 542-3).

5. The appellant maintains its right to seek disclosure at the trial of such portions of the grand jury testimony as it deems appropriate or desirable (R. 541-2).

In addition, Colgate presented facts, and statements of representatives of the Attorney General, which strongly support the conclusion that the grand jury investigation, at least so far as it related to testimony of witnesses, was conducted for the sole purpose of pre-complaint discovery for the present civil action (R. 479-85).

This material includes, among other items, testimony by the then Assistant Attorney General in charge of the Antitrust Division before a committee of the House of Representatives that "the sole means for compelling pre-complaint data in civil cases is the grand jury", which testimony was quoted in a footnote to the district court's opinion (R. 210-1). Also quoted in Colgate's brief was a statement of the Chief of the Special Litigation Section of the Antitrust Division that "the first point where we can make a final decision, based upon the facts, as to the appropriate proceeding [civil or criminal, or both], is after a file search of the subject companies" (R. 482-3).

Most of the defendants' files were produced for the grand jury during the year 1951 (R. 483). So far as we

know, most of the witnesses were called subsequent to June 16, 1952. By the time these witnesses were called the investigation had been going on for a year and the attorneys for the appellant had had the documents necessary for a decision as to whether to proceed civilly or criminally for at least five months. It is reasonable to suppose that by this time they had already decided to proceed civilly and took testimony of witnesses solely for civil discovery.

Some of the witnesses certainly were called solely for discovery purposes in the civil action. As previously noted, Colgate's president Mr. E. H. Little (now chairman of the board) testified just one week before the grand jury's term expired and it was discharged. We doubt that appellant will now say that it was only subsequent to his testimony that the decision was made not to proceed criminally.

Significant in this connection is the following statement in the Report of the Attorney General's National Committee to Study the Antitrust Laws, dated March 31, 1955 which quotes the then Assistant Attorney General in charge of the Antitrust Division as follows:

> "He has also informed us that before a criminal action is brought the following procedures are currently invoked:
>
> "In the first instance a recommendation is made by the attorney in charge of the particular investigation. If he is in the field, his recommendation is then reviewed by his field office chief. It is then reviewed by the appropriate litigation section chief in Washington. The section chief's decision is reviewed by the first or second assistant to the Assistant Attorney General and by the Assistant Attorney General. Review at the various levels is effected not only by oral conferences, but also by written memoranda of facts detailing the evidence against each proposed defendant" (p. 350).

It is obvious that this sort of thing takes time, and the decision to proceed civilly was not made one week before the grand jury's term expired, nor made on the basis of the testimony of witnesses who testified one week before the grand jury's term expired.

Another bit of evidence is the complaint itself, which is a long and complex document. It was filed two weeks and two days after the grand jury was discharged, with Thanksgiving intervening. It is not likely to have been drafted and approved in that period; it was doubtless in process long before.

All these matters were presented to the district court. He did not make any finding as to whether any or all witnesses before the grand jury were called purely for civil discovery. No such finding was necessary to support his decision. We submit, however, that in determining whether he abused his discretion in concluding that the ends of justice required disclosure, it is a legitimate consideration that all these factors indicate that some or all of the witnesses were called by the appellant solely for civil discovery.

C. Inapplicability of any policy of secrecy.

Unless the secrecy which attaches to some aspects of grand jury proceedings forbids it, requiring disclosure of this testimony could not be regarded as an abuse of discretion. The district court was certainly entitled to conclude that the liberal attitude toward discovery in civil proceedings does not contemplate the taking by one party of *ex parte* depositions under process of the court without disclosure of their contents to opposing parties.

The appellant in discussing the grand jury wraps it in a cloak of tradition and mystery that is well-nigh medieval. The fact is that there is no tradition against disclosure of the testimony of witnesses once the grand jury has been

discharged. This principle was recognized by this Court in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-4:

> "Grand jury testimony is ordinarily confidential. See Wigmore, supra, §2362. But after the grand jury's functions are ended, disclosure is wholly proper when the ends of justice require it."

Lower court cases announcing the same principle include *United States* v. *Alper*, 156 F. 2d 222 (2d Cir. 1946); *United States* v. *Byoir*, 147 F. 2d 336 (5th Cir. 1945); and *Atwell* v. *United States*, 162 Fed. 97 (4th Cir. 1908).

Even in *Goodman* v. *United States*, 108 F. 2d 516 (9th Cir. 1939), the decision upon which the appellant relies most strongly in pressing its argument for secrecy, the court said:

> "It is proper to add that the court may at any time in the furtherance of justice remove the seal of privacy from grand jury proceedings" (108 F. 2d 521).

The holding of this case was that a witness before the grand jury could properly be sworn to secrecy. This decision has now been overruled by Rule 6(e). The Advisory Committee Note to that rule states:

> "2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."

Decisions which have granted disclosure in connection with various types of proceedings other than criminal are *Doe* v. *Rosenberry*, *In re Bullock* and *In re Grand Jury*

Proceedings, all cited *supra* at page 25, and *United States* v. *Ben Grunstein & Sons Co.,* 137 F. Supp. 197 (D. N. J. 1955).

It should be noted that such criminal cases as *Costello* v. *United States,* 350 U. S. 359, *United States* v. *Johnson,* 319 U. S. 503, and *United States* v. *Garsson,* 291 Fed. 646 (S. D. N. Y. 1923), are entirely without application (see appellant's brief, page 38). They do not relate to discovery of testimony but to efforts to overturn the indictments on the ground that they were improperly returned. The problem is not one of secrecy but of orderly administration of justice. Certainly the courts should not be placed in the position of conducting a "preliminary trial to determine the competency and adequacy of the evidence before the grand jury", *Costello* v. *United States,* 350 U. S. 359, 363. This has nothing to do with secrecy, and the point would be valid whether grand jury proceedings were secret or not.

Grand jury secrecy is not, any more than any other concept of law or procedure, a shibboleth to be preserved without analysis. The reasons for secrecy have been stated in *United States* v. *Rose,* 215 F. 2d 617, 628-9 (3d Cir. 1954), and this formulation has been adopted by the appellant (see appellant's brief, pages 39-40):

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused

> who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

The obvious basis for all these reasons is to prevent interference with the grand jury itself in the conduct of its deliberations, and to prevent those whose indictment is considered from escaping on the one hand or being unfairly injured on the other. After the grand jury is discharged, in the circumstances of the present case, none of these reasons can apply.

The appellant presses only one, the fourth reason (see appellant's brief, pages 40-42). The argument is that preventing disclosure of testimony after the grand jury is discharged is necessary to protect the grand jury *as an institution.* That is not, however, the reason for secrecy as to testimony of witnesses. The reason is to protect the particular grand jury before whom the witnesses appear. Disclosure of the testimony here in question could not now interfere with the grand jury discharged in Newark on November 25, 1952. In any event, an assurance of permanent secrecy to witnesses before the Newark grand jury would not protect future grand juries. To the extent such an assurance would affect them at all, it would rather tend to encourage presentation of perjured testimony to them.

This is the point made in 8 Wigmore, *Evidence* §2362 (3d ed. 1940), the section to which this Court referred in the quotation given above from the *Socony-Vacuum* decision:

> "The witnesses and the complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury. The

secrecy is the State's inducement for obtaining testimony. * * *

* * * * * *

"But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded:

* * * * * *

"But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:

* * * * * *

"There remain, therefore, on principle, no cases at all in which, *after* the *grand jury's functions are ended,* the privilege of the witnesses not to have their testimony disclosed should be deemed to continue.

"This is, in effect, the law as generally accepted today. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required *'whenever it becomes necessary in the course of justice.'* Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle."

The appellant's discussion at pages 41-42 of its brief as to why secrecy of witnesses' testimony should survive the grand jury is curiously abstract. There is talk of the privilege as to identity of informers—but no claim that informers were used here, and indeed the appellant has offered to furnish a list of the witnesses (R. 294). There is discussion of possible pressure on witnesses in antitrust

cases. There is a statement that 24 of the 28 witnesses subpoenaed "might have been especially reluctant to speak freely about appellees before the grand jury had they anticipated that such testimony was likely to be made public."

At the same time, the appellant maintains its right itself to seek disclosure at the trial if it should deem such disclosure "appropriate or desirable" (R. 198). Also it now suggests, doubtless in deference to the philosophy underlying the decision in *Jencks* v. *United States*, 353 U. S. 657, that maybe even the appellees could properly get disclosure at the trial for use in cross-examination (see appellant's brief, pages 43, footnote, and 52-53). But if disclosure at the trial at appellant's option or for use in cross-examination is proper, the hypothetical assurance of witnesses that their testimony will not be made public becomes fairly illusory.

The simple fact which the appellant cannot obscure is that any traditional policy of secrecy is not applicable to the present situation. Disclosure of the particular testimony in this particular proceeding will not "subvert the functions of federal grand juries". It will only subvert appellant's competitive advantage in this civil action. If the district court abused his discretion, it was not on the basis of any policy of secrecy inherent in grand jury proceedings.

D. The justice of disclosure.

In opposing disclosure the appellant's whole argument is that because grand jury proceedings are secret some transcendent showing of necessity or "good cause" is required, relying on *Hickman* v. *Taylor*. Disclosure is not needed, however, says the appellant, because the evidence contained in the grand jury testimony could be secured through depositions of the grand jury witnesses.

This line of argument is based on two mutually inconsistent premises, and we suggest that the appellant should choose between them. These premises are:

1. In the grand jury transcripts is the real, frank, secret testimony of the witnesses. "Since their economic well-being thus was so closely dependent upon maintaining favorable relations with appellees, those witnesses might have been especially reluctant to speak freely about appellees before the grand jury had they anticipated that such testimony was likely to be made public" (Appellant's brief, p. 42).

2. The grand jury testimony contains nothing that could not be readily secured by taking the depositions of the witnesses, whose names the appellant has offered to furnish. "There was no showing that those witnesses were unavailable, or that appellees could not interview them or take their depositions, or that they had not done so. * * *

* * * * * *

"In sum, the situation here is comparable to *Hickman* v. *Taylor, supra,* p. 509, where, '[f]or aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories [extensive pretrial disclosures by the Government] or is readily available to him direct from the witnesses for the asking'" (Appellant's brief, pp. 46-8).

As to these two propositions, we submit:

1. Either the witnesses testified before the grand jury to facts which they would not now disclose, in which event the appellees could not obtain the relevant facts through depositions;

2. Or the witnesses said nothing before the grand jury that they would not say otherwise (barring the lapse of time and the inability of the appellees to frame

the same questions), in which event secrecy is meaningless and taking depositions would be a useless and insufficient effort at duplication.

The concrete situation is that there is nothing secret about this testimony, but it would be impossible for the appellees to duplicate it. This competitive advantage of a body of *ex parte* testimony by witnesses isolated in the grand jury room, without counsel, is what the appellant clings to.

Even if the appellees could duplicate it, the obvious question is why they should be required to do so. The task is either impossible or, if possible, pointless. Creation of a second set of transcripts on roughly the same subject matter would serve no purpose, and to the extent that it failed to duplicate the set the appellant now has, it would preserve not secrecy of the grand jury but the competitive advantage of the Department of Justice secured through process of the court. As the appellant stated at an earlier point in the case, when it was the party seeking documents:

> "The showing of good cause required by Rule 34 varies according to the facts of the particular case and considerations of practical convenience. There are no universally applicable horn-book rules. *Moore's Federal Practice*, on which the defendant relies, states (4 *Moore's Federal Practice* (2 Ed. 1950), pp. 2449-2450):
>
> > 'The party seeking inspection is required to show "good cause therefor." Considerations of practical convenience should play the *leading role* in determining what constitutes good cause' " (R. 392).

It is of interest that the current position of the appellant is based upon *Hickman* v. *Taylor*, a decision which espouses the principle of mutual discovery in civil actions but states an exception for the work product of attorneys.

Although coming close to it, the appellant does not quite dare to claim grand jury proceedings as the work product of the Department of Justice (see appellant's brief, page 38, footnote). Instead the argument runs that because of the traditional secrecy of grand jury testimony, defendants in a civil suit brought by the Attorney General must show some sort of extraordinary basis for access to these court records equivalent to or greater than what litigants in private cases must show for access to the litigation files of opposing attorneys. This is, on its face, a complete *non sequitur*. The appellees do not seek any files of the appellant; they seek only court files to which the appellant has had access, and court files as to which no reason for secrecy exists.

The facts of *Hickman* v. *Taylor* are sufficient to show the inapplicability to the present case of the phrases from that opinion sprinkled throughout appellant's brief. It was a case whose subject matter was not the history and structure of a major industry for a quarter of a century, but the sinking of a tugboat. The survivors of the sinking had testified before the United States Steamboat Inspectors at a public hearing, and this testimony was recorded and made available to all interested parties. Fortenbaugh as attorney for the owners and underwriters also interviewed witnesses. The representative of a drowned crew member brought suit and sought information by means of 39 interrogatories. The respondents answered 38 of them, but refused to answer one which demanded as of right statements of witnesses in the form of "exact copies * * * if in writing, and if oral, * * * the exact provisions of any such oral statements or reports" (329 U. S. 498-9). In refusing to sustain an adjudgment of contempt for failure to produce, this Court differentiated the written from the oral statements.

It was in respect of the oral statements that the opinion referred to the "rare situation justifying production", to which language the appellant repeatedly adverts (see appellant's brief, pages 17, 36 and 52). This was because such material could not qualify as evidence; and to use it for impeachment would make the attorney a witness, as well as invade the privacy of his professional activities (329 U. S. 513). As to the written statements, the opinion said only that "there was no room for [the trial judge's] discretion to operate in favor of the petitioner" where no attempt was made to establish any reason for production and there was "only a naked, general demand for these materials as of right" (329 U. S. 512).

Obviously this discussion, based on the effort of the attorney of one private litigant to investigate the mental impressions and take advantage of the diligence of the other party's attorney without even attempting to justify doing so, has no application here. The use by the appellant of court process to compel testimony, the sprawling nature of the issues, the enormously flexible position of the appellant here as to which issues it will press, and the absence of any element of unfair overreaching in the attempted discovery are sufficient grounds for distinction. Nor can the elaborate briefs and arguments presented by the appellees be called "only a naked, general demand."

The decisions in *Alltmont* v. *United States*, 177 F. 2d 971 (3d Cir. 1950) *cert. denied*, 339 U. S. 967 and *Martin* v. *Capital Transit Co.*, 170 F. 2d 811 (D. C. Cir. 1948) on which the appellant relies deal only with whether more than a *pro forma* showing of "good cause" is required to compel production of written statements of witnesses to accidents. Here again, what was presented to the district court in the present case was much more than a *pro forma* showing.

What constitutes an adequate showing of good cause has been the subject of some disagreement in the district courts. Thus in *Connecticut Mutual Life Insurance Co.* v. *Shields*, 17 F. R. D. 273, 277 (S. D. N. Y. 1955), the decisions are summarized as follows:

> "In line with this trend towards the elimination for formalism, the greater number of courts considering the question of good cause have decided that good cause is established when it appears that the papers sought are relevant to the subject matter of the action. * * * On the other hand, there are cases holding to the restricted view that good cause consists of something more than a showing of relevancy, as, for example, necessity, but these cases do not seem to express the modern view."

As previously noted, disclosure of these documents under Rule 6(e) does not require any formal showing of good cause. If, however, the Rule 34 standard is applied in its strictest form, the following considerations presented to the district court were ample to support the exercise of his discretion:

1. The complaint was perhaps unique in covering in such complete fashion every aspect of the defendants' businesses: selling prices, methods of selling, advertising methods, methods of promotion, packaging, production processes, patent licensing, patent acquisitions, market survey methods, use of multiple brands, by-products, purchase prices, purchasing methods, mergers, trade association activities, etc. (R. 10-3).

2. The witnesses were numerous and scattered around the country (R. 169, 433, 436-8, 471-2).

3. The subject matter of their testimony was necessarily complex but unknown to the defendants, so that

in order to develop the facts contained in their testimony it would be necessary to question each about the broad issues of the complaint. Such a duplicative and confusing procedure would make the big case even bigger (R. 478-9).

4. This process in addition to being expensive, time-consuming and harrassing to the witnesses would be inadequate. The lapse of time would have changed recollections. Counsel for the defendants could not duplicate what had been obtained years before from the witnesses questioned without counsel in the grand jury room (R. 479).

5. Such a procedure would never compensate for the plaintiff's strategic advantage in having an extra set of testimony (R. 479).

6. The plaintiff has used and will continue to use the grand jury testimony (R. 485-6).

7. The grand jury testimony was obtained by the plaintiff in part or in whole for the sole purpose of civil discovery (R. 479-85).

8. The grand jury testimony was unquestionably relevant to the issues of the complaint (R. 473-4).

In connection with the foregoing the appellant appears to suggest in its brief that the documentary disclosures made by it somehow are a substitute for the grand jury testimony (see appellant's brief pages 7-8 and 46). By their nature the two things could not be equivalent. Also, as previously noted, this documentary procedure did not require the appellant "to disclose any detailed evidential facts" (R. 236). Suffice it to say that the appellant never made this argument to the district court, who was fully familiar with what was involved.

We submit that in the light of all these considerations the district court cannot be said to have abused his discre-

tion when, on the basis of long experience with this specific case, in granting the motions he concluded:

> "I would not grant these motions if I thought they were prejudicial to the public interest, useless or unnecessary, would not reveal the information sought, or defendants already possessed all the necessary information or could obtain it by pursuing a different remedy" (R. 217).

The zeal with which it here has tried to protect its competitive advantage in exclusive possession and use of this *ex parte* testimony, and the exclusive right to suggest to the court when disclosure is or is not "appropriate or desirable" (R. 198), shows that the appellant is disarmed to argue the question of public policy. As was said in *Hoffman* v. *United States*, 341 U. S. 479, 485, quoting from *Hale* v. *Henkel*, 201 U. S. 43, 59:

> "'• • • the most valuable function of the grand jury • • • [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused' • • •".

We suggest that if there has been in the procedure in the present case any tendency to "subvert the functions of federal grand juries" (see appellant's brief, page 43), it arises not from the court's orders but from appellant's efforts to convert the grand jury from a shield between the prosecutor and the accused to a sword against these civil antitrust defendants. The ends of justice require that this effort not succeed. Under the particular circumstances of this case, the orders of the district court did not constitute an abuse of discretion.

Conclusion.

Because the judgments of dismissal appealed from were entered upon the invitation and with the consent of the appellant, they should be affirmed without consideration of the merits.

Because the appellant has no standing to appeal the orders for disclosure of the grand jury transcripts, which are court papers, the judgments should be affirmed.

Should the merits of the orders for production of the transcripts of grand jury testimony be reached, the judgments should be affirmed on the ground that those orders did not constitute an abuse of discretion by the district court.

Respectfully submitted,

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